

*Group Credit Sdn Bhd v Lee Shoo Khoo & Ors*² and *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd*.³ I agree that solicitors should be discouraged from filing contentious affidavits or affidavits where there are disputed questions of fact. However, the Rules of the High Court 1980 do not, for example, prohibit a solicitor from filing an affidavit in support of an O 14 application provided that the requirements contained therein are complied with: see *Fabrique Ebel Societe Anonyme v Syarikat Perniagaan Tukang Jam City Port & Ors*.⁴ Although the present case deals with the question of setting aside judgment in default of defence, in my opinion Encik Ibrahim's affidavit in support of the second application in so far as the draft defence and counterclaim exhibited to it is concerned, is relevant and admissible.

Under O 13 r 8, the court is given wide discretion to set aside or vary any judgment entered in default of appearance or in default of defence. In *Evans v Bartlam*,⁵ Lord Atkin in his judgment at p 480 said '...that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence...' In *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat*, Raja Azlan Shah Ag CJ (Malaya), as he then was, said, '...It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits...' The term 'defence on the merits' means a defence which discloses an arguable and triable issue: *B Daldas & Co (Pte) Ltd v Sin Sin & Co & Ors*.⁷

The question for the court to consider now is whether the draft statement of defence exhibited to Encik Ibrahim's affidavit discloses a defence on the merits or an arguable or triable issue.

In the second paragraph of the draft statement of defence, the defendant denies that he is required to pay the plaintiff as and when required but avers that the plaintiff is entitled to claim a sum equivalent to the value of the works done by the plaintiff less 6% as agreed between the parties, and this is to be ascertained by the SEDC Johor. In para 4, the defendant avers that the plaintiff intimated to him sometime in April 1986 that the plaintiff wished to terminate the contract as the plaintiff was not in a position to carry on with the work. In para 5 the defendant avers that the employer (Perbadanan Kemajuan Ekonomi Negeri Johore) paid the defendant on 5 June 1986 a sum of \$151,300. In paras 6-7, the defendant states that he had made payments to third parties and after having made such payments, the plaintiff is entitled to a payment of \$54,476.55. The defendant, however, avers that he is entitled to set-off the said sum for losses suffered by him as a result of delay caused by the plaintiff. In his counterclaim, the defendant

alleges that the plaintiff failed and/or neglected to execute the works in accordance with the time schedule stipulated by the employer in the tender agreement which the defendant intends to refer to at the trial. The defendant further states that the plaintiff through their neglect and/or refusal caused a delay of 90 days whereby the defendant was penalized by the employer for a sum of \$300 a day causing a total loss of \$27,000. In view of the delay the defendant claims from the plaintiff a sum of \$500 a day being loss suffered by the defendant and the total amount claimed is \$45,000. The defendant accordingly claims from the plaintiff a sum of \$72,000 in the counterclaim.

In my opinion, from the draft statement of defence, there is a defence on the merits or at least there is an arguable case or an issue which should go for trial.

For the reasons stated above, I dismiss the plaintiff's appeal. The defendant will file his defence within three weeks from the date of this judgment. The defendant will pay the costs of this appeal and the costs of the application before the registrar to the plaintiff.

Order accordingly.

Solicitors: *Sault & Co; Gan & Lim*.

Reported by Ng Sheau Jiuan

F **Chan Kin & Anor v Chareen Realty Development Sdn Bhd**

HIGH COURT (IPOH) – ORIGINATING MOTION
NO 32-55-1986
ABDUL MALEK J
28 APRIL 1988

Civil Procedure – Application for leave to sign judgment – Rules of the High Court 1980, O 81

Contract – Agreement in writing to develop land – Condition requiring party to obtain approval for conversion of category of land use and subdivision within specified period – Approvals not obtained within specified period – Party alleging oral agreement to extend time – Whether breach of contract had occurred – Termination

Evidence – Agreement in writing – Oral agreement varying terms of written agreement alleged – Whether evidence of oral agreement may be included – Evidence Act 1950, s 92

By an agreement in writing dated 6 April 1983 between the applicants and the respondent, the applicants had allowed the respondent, on payment of the sum of \$20,000 to them, to develop a piece of land owned by the applicants. By cl (1)(b) of art 2 of the agreement it was agreed that if the respondent failed to obtain the necessary approvals for conversion of the category

of land use within 30 months from the date of the agreement, the agreement was to be deemed to have been terminated and a sum of \$10,000 was to be refunded by the applicants to the respondent. The 30-month period expired on 30 October 1985. The applicants contended that the respondent had failed to obtain the necessary approvals when the period expired. They deposited the sum of \$10,000 with their solicitors for payment to the respondent.

The respondent had lodged a private caveat against the land and refused to withdraw it when requested by the applicants' solicitors who had written to say that the sum of \$10,000 had been deposited with them. The respondent denied that they had failed to obtain the necessary approvals within the time stipulated. They alleged that they had submitted plans to the authorities which were amended and submitted afresh within time following guidelines issued by the authorities. The respondent also alleged that the plans were amended to provide for re-siting of a surau on the demands of the applicants' agent. The respondent said that they had informed the agent that such demands would delay the development of the land and asked for a 15-month extension to which the agent had agreed on a number of occasions. Consequently, the respondent submitted fresh plans to the authorities and these were accepted by them on 3 July 1985. The respondent also said that they requested the applicants to put the extension of time in writing but the applicants refused and insisted on the forfeiture of the sum of \$20,000 as agreed liquidated damages and also insisted on other damages for the extension period. The applicants denied all the respondent's allegations except as regards the re-siting of the surau.

The applicants brought proceedings for orders for, inter alia, a declaration that the agreement was null and void and that the caveat be removed and sought judgment under O 81 of the Rules of the High Court 1980.

Held, allowing the application:

(1) The agreement was quite clear and unambiguous as regards the time period for obtaining the approvals. Apart from the fact that the 30-month period was already a reasonable period of time for that purpose, there was also no provision for extension of time in the agreement.

(2) In view of the breach of cl (1)(b) of art 2 of the agreement, the contract was deemed to be terminated and the applicants were liable to pay the \$10,000 as refund to the respondent. Further, by virtue of s 92 of the Evidence Act 1950, the court would have to exclude the evidence of any oral agreement between the respondent and the purported agent of the applicants as regards the extension of time granted by the latter.

(3) The respondent had no defence on the merits and consequently there were no triable issues. The order sought was to be granted save that the agreement was declared to be terminated instead of null and void.

Legislation referred to

Evidence Act 1950 s 92

National Land Code 1965 ss 327 & 417

Rules of the High Court 1980 O 81

Dato' Lim Seong Chun for the applicants.
W'J Concisom for the respondent.

Cur Adv Vult

A Abdul Malek J: The applicants had on 16 September 1986 by originating motion moved the court for the following orders:

- (a) a declaration that the agreement dated 6 April 1983 made between the applicants of the one part and the respondent of the other part is null and void;
- B** (b) that pursuant to s 327 of the National Land Code 1965, the Private Caveat Presentation No 3491/85 Jilid 420 Folio 54 lodged by the respondent against the said land be removed from the register;
- (c) that pursuant to s 417 of the National Land Code 1965, an order directing the Registrar of Titles, Perak, to give effect to the aforesaid order by registering the same and making all the necessary removal;
- C** (d) costs; and
- (e) such further or other relief as the court deemed fit.

D In his affidavit made on behalf of both applicants dated 11 September 1986, the second applicant averred that by an agreement dated 6 April 1983 between the applicants and the respondent, they had allowed the respondent, on payment of \$20,000 to them, to develop a piece of land held under Grant for Land No 5760 for Lot No 11629 in the Mukim of Sungei Terap in the district of Kinta (hereinafter called 'the said land') upon the terms and conditions contained therein.

He further stated that by cl (1)(b) of art 2 of the agreement it had been agreed that if the respondent failed to obtain the necessary conversion and subdivision of the said land within 30 months from the date of the said agreement, the said agreement was deemed to have been terminated and a sum of \$10,000 was to be refunded by the applicants to the respondent. He added that the 30-month period had expired on 30 October 1985 but the respondent had failed to obtain the approval for conversion and subdivision of the said land. Consequently, the applicants had deposited the \$10,000 refund with their solicitors for payment to the respondent.

On a search being made at the Registry of Titles, Perak, the deponent discovered that the respondent had lodged a private caveat against the said land vide Presentation No 3491/85 Jilid 420 Folio 54. On the instructions of the applicants, their solicitors had in fact by registered letter dated 22 February 1986 informed the respondent of the \$10,000 refund deposited with the solicitors and had requested them to withdraw the said caveat. This was followed by another letter to the respondent's solicitors dated 20 June 1986 with the same request. However, the respondent did not accede to the request.

The director of the respondent in his affidavit dated 27 May 1987 denied that they had failed to obtain the necessary conversion and subdivision of the said land

within the time stipulated. They alleged that they had submitted the plans on 14 April 1983. Before doing so, they had discussed the matter with the wife of the first applicant who is also the mother of the second applicant and who was at all times the servant or agent of both the applicants. She had also been given a layout plan to which she and the applicants had no objections.

Subsequently, the Pengarah Tanah dan Galian approved in principle the development of the lands on or about 9 March 1984 and the plans were submitted on or about 7 May 1984 following his guidelines. On or about 29 August 1984, the respondent was required to make amendments to the plans and it submitted the amended plans following the guidelines on 25 September 1984.

According to the deponent, the said plans were approved by the Pengarah Tanah dan Galian on 20 November 1984 but the applicants' agent was not satisfied with the layout plan, in particular as regards the siting of the surau. The respondent duly informed her that the applicants' demands would delay the development of the said land and asked for a 15-month extension to which she had agreed on a number of occasions. Consequently, the respondent drew up fresh plans resiting the surau and persuaded the Pengarah Tanah dan Galian to accept the amended plans which he did on 3 July 1985.

The respondent then requested the applicants to put the extension of time in writing but the applicants refused and insisted on the forfeiture of the sum of \$20,000 advanced to them as agreed liquidated damages for the extension period as stated in the said agreement. In her affidavit dated 5 April 1988, the second applicant denied, except as regards the siting of the surau, all the allegations contained in the respondent's affidavit.

Learned counsel for the respondent submitted that since this was an application under O 81 of the Rules of the High Court 1980, the applicants had to verify the facts and state that the respondent had no defence to the action. The respondent had accordingly filed their defence and had counterclaimed for the considerable sums of money they had expended on the encouragement of the agent for the applicants. As such, counsel argued that unconditional leave to defend should be given to the respondent as there was a good defence on the merits and there were issues to be tried.

Having considered the arguments and the affidavits, I was of the opinion that the agreement was quite clear and unambiguous as regards the time period for obtaining the approval for conversion and subdivision. Apart from the fact that the 30-month period was already a reasonable period of time for that purpose, there was also no provision for extension of time in the agreement.

In view of the breach of cl (1)(b) of art 2 of the agreement, the contract between the parties was, to my

mind, deemed to be terminated and the applicants were liable to pay the \$10,000 as refund to the respondent. Further, by virtue of s 92 of the Evidence Act 1950, the court would have to exclude the evidence of any oral agreement, between the respondent and the purported agent of the applicants, as regards the extension of time granted by the latter.

On these facts and considerations, I was of the view that the respondent had no defence on the merits and consequently there were no triable issues. In the event, I granted the order in terms of the motion except that the first prayer was amended to read 'terminated' instead of 'null and void'.

Order accordingly.

Solicitors: *Lim Seong Chun & Co; Concisom & Co.*

Reported by *PS Ranjan*

Syarikat Soo Brothers Construction v Gazfin Sdn Bhd

HIGH COURT (IPOH) – CIVIL SUIT NOS 116 OF 1985 AND
24-89-86
ABDUL MALEK J
23 APRIL 1988

Contract – Building contract – Claim for amount due on certificate of architect – Delay in completion – Claim for damages – Whether time essence of contract

In this case the plaintiff claimed the sum of \$145,456.19 being the money due on a certificate issued by the architect on a building contract. The defendant did not dispute the amount claimed but stated that as there was delay in completion, it was entitled to damages. It was not disputed in this case that the written agreement was signed three months after the purported date of completion and that the defendant had delayed in making payments resulting in the plaintiff threatening to stop work.

Held, allowing the application: On the facts and on the authorities cited, time was no longer of the essence of the contract and the defendant was not entitled to liquidated and ascertained damages as the court was not in a position to ascertain when the claim for damages should commence.

Cases referred to

- 1 *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118 (refd)
- 2 *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151 (refd)

Miss Ong Geok Lan for the plaintiff.
Kamaluddin Maamor for the defendant.

Cur Adv Vult

Abdul Malek J: In Civil Suit No 116/85 the plaintiff is claiming from the defendant the sum of \$145,456.19